Hossein Shakeri v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–319–11 OF 2011, B-05–320–11 OF 2011 AND B-05–317–11 OF 2011

AZAHAR MOHAMED, ROHANA YUSUF AND HAMID SULTAN JJCA

30 DECEMBER 2013

Criminal Procedure — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether there were serious errors committed by trial judge — Whether case of trafficking proven — Whether clear evidence of knowledge on the part of appellants existed — Whether trial judge had misdirected himself by invoking presumption on knowledge under Dangerous Drugs Act 1952 — Whether trial judge erred in his appreciation of defence case — Whether appellate interference warranted

Three Iranian nationals ('the appellants'), who had arrived in Malaysia on a flight from Dubai were arrested at the Kuala Lumpur International Airport ('KLIA') and subjected to a medical examination. When the x-rays revealed the presence of foreign objects in the appellants' abdomens, enemas were administered to each of them to induce a discharge of the foreign objects. The appellants discharged varying amounts of capsules, which when chemically analysed were confirmed to be methamphetamine, a dangerous drug. As the amount of drugs found in the abdomens of each of the appellants was too large for a case of own consumption, the appellants were arrested and charged for trafficking, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the end of the prosecution case, the trial judge having found that there was mens rea possession as the drugs were found in the appellants' abdomens, invoked s 37(d) of the DDA to presume knowledge. The trial judge then went on to find that there was a prima facie case against the appellants, and ordered them to enter their evidence. The appellants, who elected to give evidence on oath, testified that they had come to Malaysia to take up offers of employment. It was the appellants' contention that in consideration of their air tickets to Malaysia they were told to swallow the capsules, which they were led to believe contained 'body building powder'. The trial judge found that the defence had failed to raise any reasonable doubt on the prosecution case and thus convicted and sentenced the appellants to death. This was the appellants' appeal against the conviction and sentence on the grounds that the trial judge had erred in not considering that a case of trafficking had not been proven. In relation to this issue, the appellants argued that the trial judge had wrongly invoked the presumption of knowledge under s 37(d) of the DDA. The

A appellants further submitted that the trial judge had failed to adequately consider and appreciate the defence case.

Held, dismissing the appeals:

B (1) The appellants' submission that there was no evidence to prove knowledge was without merit. On the facts and circumstances of the present case the court was entitled to infer knowledge. The fact that the appellants voluntarily swallowed the capsules found in their abdomens would lead to the inference that the appellants knew that they had C swallowed capsules of drugs (see paras 10–12).

(2) The strict requirement knowledge on the part of the appellants should be qualified by the doctrine of willful blindness. According to this doctrine if a person shuts his eyes to the obvious because he does not want to know, D he would be taken to know what he was doing. Thus by saying that they were not aware of what they were swallowing, the appellants could not set aside the doctrine of willful blindness. The law would not protect the appellants' own folly of choosing not to find out what they were swallowing. Therefore, on the facts and circumstances of this case, even E without invoking s 37(d) of the DDA, knowledge could be easily inferred from the surrounding circumstances (see para 13).

(3) The trial judge had misdirected himself in invoking the presumption on knowledge under s 37(d) of the DDA. However, the misdirection would F not make any difference to his finding. Firstly because it did not offend the law on double presumption because the charge of trafficking was founded on direct evidence of trafficking under s 2 of the DDA and not by way of presumption of trafficking under s 37(d) of the DDA. Further, the misdirection would not prejudice the appellant's case on this issue. G The inference of knowledge on the facts and circumstances of this case was too overwhelming. Thus, despite the misdirection by the trial judge there was no reason to interfere with his finding (see para 14).

(4) After having established the necessary knowledge and hence the element H of possession of the drugs, the trial judge had correctly relied on s 2 of the DDA to find that the appellants were trafficking in drugs (see para 17).

(5) There was no merit in the appellants' submission that the trial judge had erred by his alleged failure to consider the defence of self administration I under s 15 of the DDA. The appellants' denial of knowledge was not consonant to a case of self administration of drugs under s 15 of the DDA. The trial judge had given due consideration to the defence raised by the appellants. In the circumstances, there was no appealable error to warrant interference with the trial judge's findings (see para 18).

[Bahasa Malaysia summary

Tiga warga Iran ('perayu-perayu'), yang tiba di Malaysia dalam penerbangan dari Dubai telah ditangkap di Lapangan Terbang Antarabangsa Kuala Lumpur dan tertakluk kepada pemeriksaan perubatan. Apabila x-ray menunjukkan terdapat objek asing di dalam abdomen perayu-perayu, enema telah diberikan kepada setiap daripada mereka untuk mendorong pelepasan objek asing. Perayu-perayu telah mengedar pelbagai jumlah kapsul, yang mana apabila dianalisis secara kimia adalah disahkan methamphetamine, suatu dadah berbahaya. Oleh kerana jumlah dadah dijumpai dalam abdomen setiap perayu-perayu adalah terlalu banyak untuk kes kegunaan sendiri, perayu-perayu telah ditangkap dan dituduh mengedar, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Di akhir kes pendakwaan, hakim perbicaraan setelah mendapati bahawa terdapat mens rea pemilikan kerana dadah dijumpai dalam abdomen perayu-perayu, telah mengguna pakai s 37(d) ADB untuk mengandaikan pengetahuan. Hakim perbicaraan selanjutnya mendapati bahawa terdapat kes prima facie terhadap perayu-perayu, dan memerintah mereka memasuki keterangan mereka. Perayu-perayu, yang memilih untuk memberi keterangan bersumpah, memberi keterangan bahawa mereka telah datang ke Malaysia untuk menerima tawaran pekerjaan. Adalah hujah perayu-perayu bahawa sebagai balasan untuk tiket-tiket penerbangan mereka ke Malaysia mereka diminta menelan kapsul-kapsul itu, yang mana mereka percaya mengandungi 'body building powder'. Hakim perbicaraan mendapati bahawa pembelaan telah gagal menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan dan oleh itu mensabit dan menjatuhkan hukuman mati ke atas perayu-perayu. Ini adalah rayuan perayu-perayu terhadap sabitan dan hukuman tersebut atas alasan bahawa hakim perbicaraan terkhilaf kerana tidak mempertimbangkan bahawa kes pengedaran tidak dibuktikan. Berkenaan isu ini, perayu-perayu berhujah bahawa hakim perbicaraan terkhilaf kerana menggunakan andaian pengetahuan di bawah s 37 ADB. Selanjutnya perayu-perayu berhujah bahawa hakim perbicaraan telah gagal untuk mempertimbangkan sewajarnya dan meneliti kes pembelaan.

Diputuskan, menolak rayuan-rayuan:

(1) Hujah perayu-perayu bahawa tiada keterangan untuk membuktikan pengetahuan adalah tanpa merit. Berdasarkan fakta dan keadaan kes mahkamah berhak untuk membuat kesimpulan pengetahuan. Fakta bahawa perayu-perayu secara sukarela menelan kapsul-kapsul itu yang didapti dalam abdomen mereka membawa kepada inferens bahawa perayu-perayu mengetahui bahawa mereka menelan kapsul-kapsul dadah (lihat perenggan 10–12).

(2) Keperluan ketat berhubung pengetahuan di pihak perayu-perayu harus memenuhi syarat oleh doktrin kebutaan sengaja. Menurut doktrin ini jika seseorang menutup mata kepada kenyataan kerana dia tidak mahu

mengetahui, dia dianggap telah mengetahui apa yang dilakukannya. Oleh itu dengan menyatakan bahawa mereka tidak sedar tentang apa yang mereka telan, perayu-perayu tidak boleh mengetepikan doktrin buta yang disengajakan. Undang-undang tidak melindungi kebodohan perayu-perayu sendiri kerana tidak memilih untuk mengetahui apa yang ditelan oleh mereka. Oleh demikian, berdasarkan fakta dan keadaan kes, meskipun tanpa menggunakan s 37(d) ADB, pengetahuan dengan mudah dapat disimpulkan daripada keadaan sekeliling (lihat perenggan 13).

(3) Hakim perbicaraan telah salah arah dalam menggunakan anggapan pengetahuan di bawah s 37(d) ADB. Walau bagaimanapun, salah arah itu tidak membawa apa-apa perbezaan kepada penemuan beliau. Pertama kerana ia tidak menyalahi undang-undang tentang anggapan berganda kerana pertuduhan pengedaran adalah berasaskan keterangan langsung pengedaran di bawah s 2 ADB dan bukan melalui anggapan pengedaran di bawah s 37(d) ADB. Selanjutnya salah arah itu tidak memprejudiskan kes perayu-perayu berhubung isu ini. Terlalu banyak inferens pengetahuan tentang fakta dan keadaan kes. Oleh itu, meskipun hakim perbicaraan telah salah arah tiada sebab untuk campur tangan dalam dapatannya (lihat perenggan 14).

(4) Setelah membuktikan pengetahuan yang perlu dan justeru elemen milikan dadah, hakim perbicaraan dengan wajar telah menggunakan s 2 ADB untuk mendapati bahawa perayu-perayu telah mengedar dadah (lihat perenggan 17).

(5) Tiada merit dalam hujah perayu-perayu bahawa hakim perbicaraan terkhilaf disebabkan kegagalannya yang dikatakan itu dalam mempertimbangkan pembelaan pengambilan sendiri di bawah s 15 ADB. Penafian perayu-perayu tentang pengetahuan tidak sejajar dengan kes pengambilan sendiri dadah itu di bawah s 15 ADB. Hakim perbicaraan telah memberikan pertimbangan sewajarnya terhadap pembelaan yang ditimbulkan oleh perayu-perayu. Dalam keadaan itu, tiada kekhilafan yang boleh dirayu untuk mewajarkan campur tangan dengan dapatan hakim perbicaraan (lihat perenggan 18).]

Notes

For cases on trafficking, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1929–1932.

Cases referred to

Emmanuel Yaw Teiku v PP [2006] 5 MLJ 209; [2006] 3 CLJ 567, FC (refd)

Kasanda Emmanuel lwn Pendakwa Raya [2013] 2 MLJ 833, CA (refd)

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1992] 1 LNS 318, SC (refd)

PP v Hla Win [1995] 2 SLR 424, CA (refd)
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132, FC (refd)
Teh Hock Leong v PP [2010] 1 MLJ 741; [2008] 4 CLJ, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (folld)

Legislation referred to

Criminal Procedure Code s 180
Courts of Judicature Act 1964 s 60
Dangerous Drugs Act 1952 ss 2, 15, 37(d), 37(da), 39B(1)(a), (2)

Appeal from: Criminal trial No 45A-130 of 2010, 45A-132 of 2010, 45A-133 of 2010 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the first and second appellants.
Kitson Foong (Kit & Associates) for the third appellant.
Yusaini Amer bin Abd Karim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] The three appellants were Iranian nationals. They were separately charged but jointly tried at the Shah Alam High Court, for trafficking in dangerous drugs namely methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the same Act.

[2] The amount of drugs that each one of them was charged for trafficking differed. The first appellant Hossien Shakeri was charged with an offence of trafficking 87.9g, the second appellant Mahdi Afrasiabi was charged with trafficking of 306g, and the third appellant Arshad Mohammad Senjedeh was charged with trafficking of 466g of methamphetamine, respectively.

[3] The three appellants were arrested at the Kuala Lumpur International Airport and were taken to Hospital Serdang, where they were subjected to medical examination. X-rays were taken of their abdomens. Foreign objects were detected in each of them. Enema was administered into the rectum of all the appellants, which induced the discharge of the foreign objects into the respective bed pans marked in respect of each of them. The first appellant discharged 18 capsules with content of 87.9g of methamphetamine marked as exh P12. The second appellant discharged 71 capsules containing 306g of methamphetamine ('exh P13') and the third appellant discharged 70 capsules containing 466g methamphetamine marked as exh P14.

[4] At the end of the prosecution case the learned trial judge found there was

mens rea possession when the drugs were found in their abdomens. The learned judge invoked s 37(d) of the DDA to presume knowledge. Having given a maximum evaluation of evidence before him and having applied s 180 of the Criminal Procedure Code the learned judge found that a prima facie case has been made out against all the three appellants. They were then ordered to enter their defence. All the three appellants elected to give evidence on oath.

[5] The three appellants did not deny they swallowed the foreign objects found in their abdomens but they claimed they were not aware that what they swallowed were in fact drugs. All the three appellants said they came to Malaysia to look for employment offered by one Babak, a fellow Iranian. In consideration of the air tickets to Malaysia they were told to swallow the capsules containing 'body building powder'. They claimed to have been offered employment as a mechanic, a welder and a computer salesman respectively.

[6] At the end of the trial, the learned trial judge found that the appellants failed to raise any reasonable doubt on the prosecution case. In his grounds of judgment the learned judge found all the three appellants are not conversant in either English or Bahasa Malaysia; they were not aware what salaries they would be paid; they did not produce employment letters but claimed that the employment letters were in the baggage. Further to that the learned judge found that the appellants never disclose to the investigating officer that they came to Malaysia to take up the employment offered to them. Having considered the facts, the learned judge said the explanation by the appellants could not be accepted. For these reasons the learned judge found the defence had failed to raise any reasonable doubt on the prosecution case. Consequently, the learned judge convicted all the three appellants.

[7] The three petitions of appeal by the appellants raised a number of grounds. At the hearing of the appeal before us, learned counsel for the third appellant En Kitson Fong limited his submission to two main issues. He submitted, the trial judge erred in not having considered that the third appellant is denied of any knowledge of what he swallowed were drugs and that he was an innocent carrier. The second ground raised is on the alleged failure of the learned judge in not having accepted the defence of the third appellant, together with the other appellants, that they came to Malaysia to accept employment, simply on the basis that the appellants could not explain on their employment details.

[8] In addition to the above, for the first and the second appellants, learned counsel Encik Hisyam Teh Poh Teik confined the grounds of appeal to another two main issues. He submitted that the learned judge wrongly invoked a presumption of knowledge under s 37(d) of the DDA, against the appellants. He cited in authority the Federal Court decision of *Syed Ali bin Syed Abdul*

Hamid & Anor v Public Prosecutor [1982] 1 MLJ 132. Secondly, he contended the learned judge erred in not considering that a case of trafficking has not been proven and if at all. He submitted that at most the first and second appellants may be convicted under s 15 of the DDA instead.

[9] The facts of the present case revealed that all the three appellants did not deny that they swallowed the capsules of drugs, which were found in their abdomens. They did not say that they were forced to swallow them and did not deny that they swallowed them voluntarily. The amount of drugs found in the abdomens of each of the appellants is too large for a case of own consumption.

[10] We do not find merits in the submission of both learned counsel that there was no evidence to prove knowledge. We agree with the learned trial judge when he states in his grounds of judgment that 'knowledge' can be proven on circumstantial evidence.

[11] We find on the facts and circumstances of the present case, relying on the conduct of swallowing voluntarily, would entitle the court to infer knowledge. There are decided cases of similar nature where the accused swallowed drugs, such as the Federal Court case of *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 567, the Court of Appeal decision in *Kasanda Emmanuel v Public Prosecutor* [2013] 2 MLJ 833 as well as *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, which state this legal proposition. In all these cases the drugs were also found in the abdomens.

[12] In *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741; [2008] 4 CLJ, it was held by the Federal Court that the method employed to convey or transport the drugs furnish evidence of knowledge. In this regard, SP9 (Dr Siti Jusna @ Siti Sharifah bt Muhammad, a radiologist) testified that the capsules discharged were *ketulan bujur objek putih sausage shape dan sekeliling objek ada jalur hitam*. All the three appellants swallowed these capsules voluntarily and in our view these surrounding facts inferred that the appellants know that they swallowed capsules of drugs.

[13] Given the facts as they are, we agree with the learned DPP (En Yusaini Amer bin Abd Karim) that there was no necessity to invoke any presumption on knowledge. It must be emphasised that the strict requirement knowledge on the part of the appellants must be qualified by the doctrine of willful blindness. It is a doctrine where if a person shuts his eyes to the obvious simply because he does not want to know, he must be taken to know what he is doing, (see *Public Prosecutor v Hla Win* [1995] 2 SLR 424). The appellants in saying that they were not aware of what they were swallowing, cannot set aside the doctrine of willful blindness because they have opportunity to find out what they were swallowing. If they chose not to then the law cannot be seen to protect their

own folly. Therefore on the facts and circumstances of this case, even without invoking s 37(d) of the DDA, knowledge can be easily inferred from these surrounding facts.

[14] Following that we agree with En Hisyam's submission that the learned judge had misdirected in invoking the presumption under s 37(d) of the DDA on knowledge. We have considered the authority cited by learned counsel on this issue in *Syed Ali bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132. Learned counsel sought to argue that in *Syed Ali* the Federal Court in relation to the word 'anything whatsoever' in s 37(d) of the DDA would preclude the application of this section to the present case because the drugs were found in the bowel or rectum of the appellants, which cannot be described as 'anything whatsoever' as envisaged in *Syed Ali.*

[15] Having said that we are however of the view that the misdirection of the learned judge in wrongly invoking s 37(d), would not make any difference to the finding on the facts of the present case in the light of the fact as we have stated earlier that the appellants had the knowledge of what they had swallowed were drugs. We find that such misdirection is of no consequence to the prosecution nor would it prejudice the defence case for two reasons. Firstly, even if the presumption under s 37(d) was invoked by the learned judge it does not offend the law on double presumption because the charge of trafficking has been founded on direct evidence of trafficking under s 2 and not by way of presumption of trafficking under s 37(d) of the DDA. Secondly, the misdirection by the learned judge would not prejudice the appellant's case on this issue because of the presence of clear and overwhelming evidence on knowledge as we have alluded to in the earlier paragraphs herein.

[16] We are guided by the case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 on this issue. The Federal Court held in that case that exceptionally, a conviction by a trial court would be upheld despite misdirection if a reasonable tribunal would have convicted a person on available evidence on a proper direction. The inference of knowledge on the facts and circumstances of this case is too overwhelming that despite misdirection by the learned judge in invoking s 37(d) we see no reason to interfere with his finding. The factual inference that the appellants indeed possessed the necessary knowledge of what they swallowed were drugs, are overwhelming. In *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1992] 1 LNS 318 the Federal Court held that even in a case where the judge applied the wrong test when calling for the defence, the error was of no consequence and it did not vitiate the conviction, because even if he had applied the more stringent test, the result would have been the same having regard to the absolutely overwhelming nature of the case of the

prosecution. No substantial injustice had actually occurred and the court applied the proviso to Courts of Judicature Act 1964 s 60.

[17] Having established that the appellants had the necessary knowledge and hence were in possession of the drugs in question, we agree with the learned judge that relying on s 2 of the DDA the appellants were trafficking in drugs. As shown in their boarding passes in exhs P45, P54, P55 and P60, they were transporting drugs when they were flying from Dubai to Malaysia. The suggestion and submissions of learned counsel that a trafficking case was not made out against each of the appellants is therefore devoid of merit.

[18] This brings us to the submission of learned counsel on the failure of the learned judge to consider an offence of self administering drugs under s 15. In view of the amount involved the legal presumption under s 37(da) remains unrebutted couple with the fact that the appellants did transport the drugs from Dubai to Kuala Lumpur the case falls squarely within the definition of trafficking. The appellants had never raise in their defence and in fact their denial of knowledge is not consonant to a case of self administration of drugs under s 15 DDA. We therefore do not see any error by the learned judge on his alleged failure to consider the defence of self administration under s 15 of the DDA.

[19] We find the learned judge had given due consideration to the defence raised in his grounds of judgment. He had analysed the defence by deliberating on a totality of evidence before him. We find that there is no appealable error to enable us to interfere with the learned judge's findings. Having scrutinised the appeal records with care, we are satisfied that on a totality of evidence, the convictions of all the three appellants are safe. We therefore dismissed their appeals and affirmed the convictions and sentences by the High Court on all the three appellants.

Appeals dismissed.

Reported by Kohila Nesan